United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,272

66

JOHN H. LEAKS, Appellant,

v

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Thomas J. Schwab,

616 Investment Building
Washington 5, D.C

Attorney for Appellant,
appointed by this Court

STATEMENT OF QUESTIONS PRESENTED

1. Whether the testimony of the police offecer that appellant was the person from whom he purchased narcotics, which was the only testimony linking appellant to the offenses, was such that a reasonable man must have had a reasonable doubt that appellant was such person, and hence whether there was, as a matter of law, a reasonable doubt as to appellant's guilt?

2. Whether the one witness who linked appellant to the offenses, the police officer, gave testimony, on a matter directly bearing upon his credibility as a witness, which this Court should find to have been false, and, if so, whether such false testimony requires reversal of appellant's conviction?

3. Whether there was unreasonable delay on the part of the Government in arresting appellant as the person it suspected of selling the narcotics to the officer, and further delay in informing appellant of the charges against him, and, if so, whether such delays deprived appellant of his right to a fair and speedy trial, thus requiring reversal of his conviction?

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 18,272

JOHN H. LEAKS, Appellant

v

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a judgment and commitment of the United States District Court for the District of Columbia, dated November 15, 1963, under the terms of which appellant was convicted on all six counts of an indictment charging two violations of each of Sections 4704(a) and 4705(a) of Title 26, and Section 174 of Title 21 of the United States Code. The sentence was eight years on count one, eight months to two years on count two, eight years on count 3, eight years on count 4, eight months to two years on count 5 and eight years on count 6, the

sentences on counts two to six to run concurrently with the sentence on count one. A notice of appeal was filed on November 29, 1963, and a motion for leave to proceed on appeal without prepayment of costs was granted by the District Court on December 3, 1963. The District Court had jurisdiction under Sections 11-305 and 11-306 of the District of Columbia Code (1961), and this Court has jurisdiction under Section 1291 of Title 28 of the U. S .Code.

STATEMENT OF THE CASE

The first three counts of the indictment charged appellant with selling narcotics not in pursuance of a written order (count one), selling narcotics not in or from the original stamped package (count two) and facilitating the concealment and sale of narcotics imported, with knowledge, contrary to law (count three), all based upon an alleged sale of narcotics to a police officer on January 24, 1963. The remaining three counts of the indictment charged appellant with the same three offenses, and were based on an alleged sale of narcotics to the same officer on February 6, 1963.

At the trial, Officer Rufus Moore testified that he was an undercover officer working with the Narcotics Squad of the Metropolitan Police Department, that at approximately 10:05 P. M. on January 24, 1963, he approached appellant in the 1900 block of 14th Street, N. W., and that appellant was standing alone at the time (Tr. pp. 23-24). The officer then testified as follows (Tr. p. 24):

"A. Upon approaching him I asked him if he does sticking, at which time he replied yes, he had a nice $12 bag. At this time I told him I wanted one bag and handed him $12 of

Metropolitan Police Department advance funds. Taking the money, he turned to his rear. There was a negro female, unidentified at the time, standing to the rear. He called over to her and told her to give him one bag. She took one small bag from a purse in her hand.

Q. What did she do with that bag?

A. Gave it to Leaks.

Q. What did he do with it?

A. He handed it to me."

Officer Moore further testified that he saw appellant again on February 6, 1963, that appellant was again alone, that the officer approached him and made a second purchase of narcotics. At the close of his direct examination, Officer Moore testified that he had had no occasion to see the person from whom he purchased narcotics since February 6, 1963 (Tr. p. 30)--the trial took place on October 8, 1963.

On cross examination, defense counsel went immediately to the matter of identification of appellant as the person from whom the officer had purchased the narcotics. His first questioning of the officer was as follows (Tr. pp. 30-31):

"Q. Prior to January 24, 1963, did you know the defendant John Leaks?

A. Did I knew him, sir?

Q That's right. Did you know him?

A. No, sir. I did not.

Q. Did not know his name?

A. No, sir. I did not.

Q. When did you first learn his name?

A. On the 24th. I knew him by Johnny.

Q. When did you first know his name as John Leaks?

A. I identified him by a photo I found in our files in the Narcotic Squad Office, between 11:30 and 12:00 o'clock on the 25th, when I turned the first exhibit in to Detective Fogel of the Narcotic Squad Office.

Q. What you are telling us is, you made a buy of narcotics from a person you didn't know, then you picked out a picture to match the person.

A. I identified him from our files. Yes, sir."

Defense counsel then requested and was furnished the officer's notes. He asked the officer whether appellant's name appeared in the notes of the February 6 purchase and was told that it did not (Tr. p. 37).

Defense counsel then asked a series of questions relating to the matter of other purchases of narcotics made by Officer Moore on the days of the two alleged offenses and during the two month period of January and February, 1963 (Tr. pp. 37-39):

"Q. Officer, directing your attention to this period, January 1963 and February 1963, approximately how many sales of narcotics or purchases of narcotics did you make in your official duties as a Police Department purchaser?

A. From what time, sir?

Q. From January 1963, and the month of February 1963?

A. Sir, I can't say. I don't recall.

Q. Can you tell me now, Officer, how many purchases of narcotics you made on January 25, 1963?

A. No, sir, I can't.

Q. Was it more than one?

A. I can't recall.'

Q. Can you tell me, sir, how many purchases of narcotics you made on February 6, 1963?

A. I can remember one, sir.

Q. And that was Leaks?

A. Yes, sir.

Q. Anymore?

A. No, sir. I can't recall anymore.

Q. Is it possible you made more that morning or that evening?

A. Not that I can recall, sir. No.

THE COURT: What was the first inquiry? How many purchases were made in --

MR. DWYER: January, 1963.

THE COURT: The whole month of January?

MR. DWYER: The whole month of January. And the whole month of February, and the specific dates. January 25.

THE COURT: January 25?

MR. DWYER: Yes sir. I am sorry. January 24, Your Honor, 1963.

THE COURT: January 24.

MR. DWYER: Yes, and February 6.

BY MR. DWYER:

Q. You don't recall how many purchases you made?

A. I recall the days that I made the purchases from him. I can recall those dates, yes.

Q. One of those dates, you say, was January 24?

A. Yes, sir.

Q. How many purchases of narcotics did you make on January 24, 1963?

A. The one I remember is the one I made from Leaks.

Q. Did you make anymore?

A. I don't recall.

Q. Would the same testimony go for February 6?

A. Yes.

Q. You don't recall?

A. No, sir.

Q. While you were working as an undercover officer approximately how many purchases of narcotics would you make in a week?

A. There is no set amount.

Q. An average.

A. I don't know.

Q. You couldn't even give us an approximation?

A. No, sir."

On redirect examination, Officer Moore testified that the reason why appellant's name did not appear in his notes of the February 6 purchase was that he had first learned of appellant under the name "Johnny," and that it was his practice to refer only to the alias by which he first learns of a person (Tr. p. 41). He also testified that his notes of the January 24 transaction referred to the seller of the narcotics as "Johnny" (Tr. p. 42).

Bertram F. Fogle was then called as a witness for the Government. His testimony (Tr. pp. 43-44) supported Officer Moore's testimony concerning the identification of appellant by Officer Moore from the photos of the Narcotics Squad.

The jury was then informed (Tr. pp. 46-47) of the stipulation of the Government and the defense that the powders purchased by Officer Moore on the two days in question were narcotics, that there was no order form, that they were imported in violation of law and that no tax stamps were on the container.

Appellant then took the stand in his own behalf and denied having taken part in the transaction on January 24 or the transaction

on February 6 and denied ever having seen Officer Moore before the day of the trial. He further testified that he had departed the area on the 23rd of January for Greenville, South Carolina, and that he had been in Greenville until the time of his return to Washington on the 9th or 10th of February, 1963 (Tr. pp. 49-50). On cross-examination, it was brought out that the trip to Greenville was by car, and that the car was owned by appellant's wife's employer, Clarence Worthy (Tr. pp. 52-53).

The defense then called appellant's wife, Helen M. Leaks, whose testimony (Tr. pp. 61-71), both on direct and on cross examination, supported in every essential element appellant's testimony concerning his absence from Washington during the period covering the two alleged offenses. Mrs. Leaks was followed on the witness stand by appellant's mother, Mrs. Ruth Anderson, whose testimony (Tr. pp. 71-83) also supported appellant's testimony to the effect that he, his wife and his mother had all departed for Greenville, South Carolina prior to the date of the first alleged offense, and had returned shortly after the date of the second alleged offense..

The summations of both counsel and the court's instructions framed the issue of the identity of the person who sold narcotics to Officer Moore on the two dates in question as the sole issue in the case, and the jury was instructed, pursuant to stipulation of the parties, that the powders purchased by Officer Moore were in fact narcotics and that whoever it was from whom Officer Moore took them, if he did take them, was guilty of violation of the three statutes involved (Tr. p. 110).

The record in this case reveals that appellant was arrested on March 15, 1963, that the warrant for his arrest and the charge for

which he was held at the preliminary hearing referred only to the alleged incident of January 24, 1963. So far as appears from the record, the first indication to appellant that he was also being charged with the alleged offense of February 6, 1963, was on May 27, 1963, at which time appellant was advised of the action of the grand jury.

STATEMENT OF POINTS

1. The trial court erred in denying appellant's motion for judgment of acquittal notwithstanding the verdict.

2. Appellant's conviction should be reversed because the only witness whose testimony linked him with the offenses gave testimony, on a matter going to his reliability as a witness, which this Court should find was false.

3. Appellant's conviction should be reversed because the Government's delay in arresting him and in informing him of the charges against him deprived him of his constitutional right to a fair and speedy trial.

SUMMARY OF ARGUMENT

1. The only testimony linking appellant to the two offenses was that of Officer Moore, who testified that appellant sold narcotics to him. The circumstances of the officer's identification of appellant, including the fact that he did not know him prior to the dates of the alleged offenses, that he did not see him during the eight-month period between the second offense and the trial and that he was unable to recall other events during the same period of the two offenses, were such that a reasonable man must have had a reasonable doubt that appellant was the

person who sold the narcotics to the officer. Appellant's motion for judgment notwithstanding the verdict should therefore have been granted.

2. Officer Moore's credibility as a witness was the crucial issue in the case. When defense counsel in his cross-examination of the officer sought to place before the jury facts which would enable them to determine the weight to be given his testimony, the officer gave testimony which this Court should recognize must have been false and which the Government must or should have recognized as false. A conviction based upon such testimony should not be permitted to stand.

3. The police had the opportunity and the evidence necessary to arrest the person from whom Officer Moore purchased narcotics on or about February 7, 1963, yet appellant was not arrested until March 15, 1963, and the record reveals that he was not advised of the fact that he was being charged with the February 6 offense until May 27, 1963, when he received a copy of the indictment. This delay in arresting appellant and informing him of the charges against him was unreasonable under the circumstances of this case, and was necessarily prejudicial to appellant's ability to establish his whereabouts on the two days in question by independent testimony. The delay therefore constituted a denial of appellant's right to a fair and speedy trial, and requires that his conviction be reversed.

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE EVIDENCE LINKING APPELLANT TO THE ALLEGED CRIME WAS SUCH THAT A REASONABLE MAN MUST HAVE HAD A REASONABLE DOUBT AS TO APPELLANT'S GUILT.

(With respect to this Argument, appellant desirs the Court to read the entire testimony of Officer Moore: Tr. pp. 22-45.)

After the verdict of the jury in this case, appellant moved the trial court for a judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial, on the ground that, considering the evidence entered at the trial, reasonable men could not but have a reasonable doubt as to appellant's guilt. The motion was dened by the trial court at sentencing (Tr. - Sentencing - p. 3).

Under the stipulation on the basis of which this case was tried, the jury had to decide but one issue, namely, whether appellant was the person who sold narcotics to Officer Moore on January 24 and February 6, 1963. The only testimony which could support the jury's verdict was that of Officer Moore. It is appellant's position that a review of the evidence in this case can lead to no conclusion other than that a reasonable man must have a reasonable doubt that appellant was the person who sold narcotics to Officer Moore on January 24 and February 6, 1963, and, therefore, that the motion for judgment of acquittal notwithstanding the verdict ought to have been granted.

It is well settled that questions of credibility of witnesses are to be determined by the jury and that the jury's determinations of fact are binding upon the parties if supported by the evidence. It is also well settled, however, that where the evidence presented to the jury in a criminal case is such that, in the view of the court, a reasonable man must have a reasonable doubt as to the defendant's guilt, a verdict

of guilty will not be permitted to stand -- Farrar v. United States, 107 U.S. App. D.C. 204, 275 F. 2d 868 (1959). Hopkins v. United States, 107 U.S. App. D.C. 126, 275 F. 2d 155, Cooper v. United States, 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954). Moreover, these cases make clear that this principle applies even where the court is thereby required to pass upon the credibility of witnesses. Thus, for example, in the Farrar case, supra, this Court found the testimony of the complaining witness on one point "so nearly incredible" that the Court was impelled to conclude that it could not, as a matter of law, lead to guilt beyond a reasonable doubt. In so concluding, the Court pointed out (footnote 5, 107 U.S. App. D.C. at 206):

> "In several of the cases cited in Hopkins, as in the present case, the defendant's guilt would have been clear beyond a reasonable doubt if the veracity of an essential witness had been unquestionable."

See also Benton v. United States, 88 U.S. App. D.C. 158, 188 F. 2d 625 (1951), Kelly v. United States, 90 U.S. App. D.C. 125, 194 F. 2d 150, (1952), Wilson v. United States, 106 U.S. App. D.C. 226, 271 F. 2d 492 (1959).

Officer Moore was the only witness who connected appellant with the alleged offenses.[1/] It is appellant's contention that on the basis of the officer's testimony, and considering the admissions made by him and the inferences concerning the reliability of his testimony which must be drawn from them, a reasonable jury must have had a

---

1/ Appellant, his wife and his mother all testified that appellant was in South Carolina from January 23 to February 10, 1963, and hence that he could not have sold narcotics in Washington on January 24 or February 6. Appellant recognizes that the weight, if any, to be given to that testimony was for the jury to determine.

reasonable doubt that appellant was the person who sold narcotics to the officer.

In the first place, the officer admitted that he did not know the person from whom he purchased the narcotics prior to the first alleged incident.

"Q. Did you know him?

A. No, sir, I did not." (Tr. p. 30.)

"Q. What you are telling us is you made a buy of narcotics from a person you didn't know; then you picked out a picture to match the person.

A. I identified him from our files. Yes, sir." (Tr. p. 31.)

It should be pointed out that this testimony alone raises a substantial doubt as to the officer's having correctly identified appellant -- this Court can surely take notice of the fact that sellers of narcotics are extremely unlikely to sell them to a person they do not know, and, conversely, that an undercover agent with the Narcotics Squad is not likely to approach a person he does not know and attempt to make a purchase from him.

It does not appear that Officer Moore had any contact with or saw the person from whom he purchased narcotics between January 24 and February 6, and his only identification of appellant as the person from whom the January 24 purchase was made was by inspecting the photo files of the Narcotics Squad.

By the date of the second alleged purchase, February 6, 1963, Officer Moore says that he knew appellant's name -- yet he did not use it in his notes relating to the purchase on that date. While the officer explained (Tr. p. 41) that once he knew a person by an alias, he continued to refer to him by that alias, and that the alias by which he identified

appellant was "Johnny," it seems incredible that if the officer knew appellant's real name, that name would not also appear in his notes, particularly when the alias is a rather common one. In short, while the officer's explanation of the failure of appellant's name to appear in his notes might be credible in the presence of other clear evidence of identification, the explanation under the circumstances of this case adds to doubt which must exist as to his identification of appellant.

Officer Moore did not cnce see the person from whom he purchased narcotics between February 6 and the date of the trial, October 8 (Tr. p. 30), a period of some eight months. Thus, although appellant was arrested upon the complaint of one whose identification of him was solely on the basis of a photograph, the officer was not asked to verify the identification at the time appellant was arrested. 2/

It thus appears that Officer Moore's only contact with the person from whom he bought narcotics was on the occasion of the two purchases themselves, which, judging from his testimony, could not have lasted more than a minute or two each. On the basis of these contacts alone, the officer swears, some eight months later, that appellant is the person from whom he bought the narcotics. It is respectfully submitted that such a narrow thread of testimony linking appellant to the crimes itself gives rise to a serious question as to whether the Government has thereby proven appellant's guilt beyond a reasonable doubt. But

---

2/ Appellant understands that it is ordinary police procedure, when someone is arrested upon the complaint of one who saw him commit a crime, that the complaining witness is asked to identify the person arrested as the persom whom he saw commit the crime. It is not known why this procedure was not followed in this case. Such a procedure, were it followed in cases such as this, might well reduce the number of cases in which the identification of the defendant is as tenuous as it was here.

there are additional factors here involved which create an even more serious doubt concerning the identification of appellant by the officer.

On cross-examination of Officer Moore, defense counsel sought to bring before the jury some idea as to the approximate number of purchases of narcotics made by Officer Moore on the two days in question and during the general period covered by the two days. It requires little conjecture to discern counsel's purpose in this line of questioning -- if, as counsel from his experience must have suspected to be the fact, this officer had made several such purchases from different persons on the two days, and a substantial number from different persons during the two-month period, it might well raise a question in the minds of the jury as to the officer's ability, eight months later, to remember appellant as the person from whom he purchased narcotics on the days in question, particularly in view of the fact that he had not known such person previously, that he had such slight contact with him, and that he never saw him again prior to trial, not even at the time of his arrest.

The complete testimony of Officer Moore concerning this vital point is set forth on pp. 4-6, supra. As there appears, the officer stated that he was unable to recall approximately how many purchases he had made during January and February, 1963, how many on January 24, how many on February 6, or whether he made any other purchases on those days -- he was also unable even to approximate the average number of purchases he would make in a week while working as an undercover officer with the Narcotics Squad.

Appellant has set forth below (pp. 18-20) his contention that this Court should find, from its own experience and on the basis of judicial notice, that such testimony could not have been true, and his

position regarding the consequences which flow from such a finding. But here let us assume, arguendo, that the testimony was true, that this officer could not remember, specifically or even generally, events which took place on the same days as the alleged offenses, or even events which took place generally within the same months as the alleged offenses, that he could not remember events of the same type as, and requiring even less specific recollection than, the identification of appellant as to which he was so certain. Such is the memory upon which appellant has been deprived of his liberty for eight years, a memory which recalls appellant as a seller of narcotics on January 24 and February 6 but which is unable to recall any other alleged sellers of narcotics with whom the officer had contact, not only on those two dates, but during the entire months of January and February. Appellant submits that the jury should not be permitted to speculate on such a memory, and that this Court should hold the reliability of Officer Moore's testimony so seriously questionable that a reasonable man must have had a reasonable doubt as to the identification of appellant on the sole basis of his testimony.

Quite apart from the unreliability of Officer Moore's memory, as demonstrated by his answers to the questions set forth above, the subject of his other activities during the period, which defense counsel sought unsuccessfully to bring before the jury, itself raises an additional doubt as to the identification of appellent and hence to his guilt. This Court can and should take judicial notice of the fact that agents such as Officer Moore, whose job it is to make purchases of narcotics, do in fact make numerous purchases from numerous different

persons during the period in which their anonymity is preserved.[3] It is submitted that the likelihood of confusion and misidentity under such circumstances, no matter how honest the officer might be, is so great that this Court should scrutinize with special care the evidence against an alleged seller and be satisfied that the jury could find his identification proved beyond a reasonable doubt. The identification of appellant by one who admittedly did not know him, who saw him on two short occasions, who was not asked to identify him at the time of his arrest and who did not see him during the eight-month period prior to trial will not hold up under such scrutiny.

Another fact which casts grave doubt upon the officer's identification of appellant was not before the jury but was part of the record before the District Court and is now in the record before this Court. Appellant was arrested on March 15, 1963, pursuant to a warrant issued upon the complaint of Officer Moore. The offense alleged in that complaint was the alleged sale of narcotics on January 24, 1963. No mention was made in the complaint or in the arrest warrant of any such sale on February 6. If Officer Moore knew at that time that appellant was the person from whom he had purchased narcotics on February 6, 1963, and the Government nevertheless deliberately withheld that information from appellant, a substantial question would be raised as to whether such deliberate withholding constituted a violation of appellant's constitutional right to a speedy and a fair trial (see Argument III, pp. 20-25) below). This Court should not presume facts which give rise to such a

---

3/ The testimony in Ross v. United States (No. 17877) referred to purchases by a similar agent from more than fifty persons. See the opinion of Chief Judge Bazelon in Tee Ann Wilson v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 17,895, on petition for rehearing en banc, decided February 13, 1964).

serious question. The only other conclusion, and the more likely one, which can be drawn from the failure of the complaint to refer to the February 6 purchase is that at that time Officer Moore did not connect appellant with that purchase. Such a conclusion not only negatives his identification of appellant at the trial as the one from whom he purchased narcotics on February 6, but also creates a reasonable doubt as to whether he correctly identified appellant at all.

The testimony against appellant by Officer Moore was completely uncorroborated.[4/] This Court has, in certain classes of cases, held that corroboration is, as a matter of law, required in order to convict. Kidwell v. United States, 38 App. D.C. 566 (1912) (rape); Kelly v.United States, supra., p. 11 (invitation to commit homosexual acts); Wilson v. United States, supra., p. 11 (indecent liberties with a child); see Weiler v. United States, 323 U.S. 606 (1945)(perjury). In Tee Ann Wilson v. United States, ____ U.S. App. D.C.____, ____ F. 2d ____ (No. 17,895, decided October 3, 1963, rehearing en banc denied February 13, 1964), although the Court stated that the uncorroborated testimony of a narcotics agent was sufficient evidence upon which to base a conviction, the Court also made it clear that there was corroboration in that case. It appears that two judges of this Court, in dissenting from the denial of the rehearing, thought the Court should give consideration to requiring corroboration in such cases, at least where there is delay in arresting the defendant.[5/]

4/ Although Officer Moore testified (see p. 3, supra.) that a woman was directly involved in the January 24 purchase, no such person was called by the Government as a witness at the trial.

5/ One of the reasons underlying this view was stated by Chief Judge Bazelon as follows (slip opinion, p. 4): "An obvious danger is that the memory of the narcotics agent, who has dealt with many addicts and sellers in his period of undercover work, will be blurred."

Appellant does not urge the Court to establish a rule requiring corroboration in all cases of purchases of narcotics by narcotics agents. He does submit, however, that lack of corroboration must be considered in determining whether the evidence is such that the jury could find guilt beyond a reasonable doubt.

Under all the circumstances of this case, as set forth herein, including the lack of corroboration of Officer Moore's testimony, it is respectfully submitted that the jury must, as a matter of law, have had a reasonable doubt as to the identification of appellant by the officer, and hence as to appellant's guilt. The trial court, therefore, erred in denying appellant's motion for judgment of acquittal notwithstanding the verdict.

II. APPELLANT'S CONVICTION SHOULD NOT STAND WHERE THE ONLY EVIDENCE CONNECTING HIM WITH THE ALLEGED OFFENSES WAS THE TESTIMONY OF A POLICE OFFICER WHO, WITH RESPECT TO A CRUCIAL MATTER BEARING DIRECTLY ON HIS RELIABILITY AS A WITNESS, GAVE WHAT THIS COURT SHOULD JUDICIALLY NOTICE WAS FALSE TESTIMONY.

(With respect to this Argument, appellant desires the Court to read Tr. pp. 37-39, which is set forth verbatim at pp. 4-6, supra.)

As appears from the portion of the transcript set forth on pp. 4-6, supra, defense counsel sought, in his cross-examination of Officer Moore, to bring before the jury relevant testimony concerning other activities of Officer Moore on the days of the alleged offenses and during the periods covered by them. Appellant has already indicated the legal consequences which he submits follow if this Court concludes that this rather incredible testimony was true -- i.e., that the officer could not remember any other purchases on the two days in question, or whether he had made more than one purchase during the entire two-month period, and

that he could not even estimate the number of purchases he would make on the average during a similar period.

With all due deference to a member of the Metropolitan Police Force, appellant respectfully submits that this Court, from its own experience with such matters, knows that this testimony, from the same person who unhesitatingly and unequivocally identified appellant as the person from whom he bought narcotics during the same period referred to in the questioning, could not have been true, and, moreover, that the Government which allowed such testimony from its witness must or should have known that it could not be true. It is simply not possible that this officer who so clearly identified appellant could not recall any other purchases he made during the two days in question, nor during the two months, and that he could not hazard a guess as to the average number of purchases made by him during an average week of activity as an undercover officer. There may well be reasons why this officer did not wish to give answers to defense counsel's questions, and it may even be that it is departmental practice that officers avoid answering such questions. But the officer did not decline to answer the questions. He answered them, and in a way which requires a conclusion that the answers were not truthful.

The testimony which appellant contends was false was directly related to the most crucial, and in fact the only, issue in the case -- namely, the identity of appellant as the person from whom the officer purchased narcotics. Appellant was faced in this case with the difficulties so graphically described by Judge Wright in his opinion in Nickens v. United States, ____ U.S. App. D.C. ____, 323 F. 2d 808 (No. 17,735, decided September 19, 1963). If Officer Moore was mistaken

and appellant was not the person from whom he purchased narcotics, appellant's only possibility of avoiding an unjust conviction was by instilling a doubt in the minds of the jury as to whether the officer was not mistaken in his identification of appellant. The questions asked of the officer concerning his other activities during the period would, if answered truthfully, have placed before the jury information which was vital to their appraisal of the reliability of the officer as the only witness who linked appellant to the crime. False testimony on this point was clearly prejudicial to appellant.

If the officer's testimony was false, as appellant submits the Court should find it to have been, the Government, which heard the officer's positive identification of appellant contrasted with his professed inability to recall the other events of the same period, must or should have known it to be false. A conviction based upon such testimony should not be permitted to stand -- see Napue v. United States, 360 U.S. 264 (1959) and cases cited therein.

III. FAILURE OF THE GOVERNMENT TO ARREST APPELLANT AND INFORM HIM OF THE CHARGES AGAINST HIM FOR AN UNREASONABLE AND UNEXPLAINED TIME FOLLOWING THE POINT AT WHICH THE GOVERNMENT HAD THE OPPORTUNITY, AND CLAIMED IT HAD SUFFICIENT EVIDENCE, FOR AN ARREST, DENIED APPELLANT THE FAIR AND SPEEDY TRIAL TO WHICH HE WAS ENTITLED.

The first alleged offense in this case took place on January 24, 1963. At that time, Officer Moore, according to his testimony, purchased narcotics from appellant. The person from whom the officer purchased narcotics was clearly within the immediate reach of the officer and had, according to the officer's testimony, committed a felony in the officer's presence. The Government, therefore, had at that time in its possession

more than sufficient evidence, and a clear opportunity, to arrest such person and charge him with the crime for which appellant was later indicted. Notwithstanding the foregoing, no arrest was made.

Again, on or shortly after February 6, 1963, the Government claims that it was in a position to arrest the same narcotics seller and charge him with two sales of narcotics, but again no arrest was made. In fact, the Government waited until March 15, 1963, to arrest appellant, who it claims was the seller on these two occasions. Moreover, it appears from the record that the warrant for appellant's arrest was upon the sworn complaint of Officer Moore, that the complaint nowhere refers to the alleged February 6 offense, and that in the commitment proceedings before the United States Commissioner nothing was said about the February 6 offense. As a matter of fact, so far as the record indicates, appellant was not advised of the February 6 offense until he received a copy of the indictment on May 27, 1963, almost four months following the February 6 date.

It is appellant's contention that the delay in arresting him and the delay in informing him at the time of his arrest concerning both the offenses for which an indictment against him would be sought, had the effect of denying him the fair and speedy trial to which he had a constitutional right.

In its most recent case on the subject, this Court has declined to take the position that a delay on the part of the Government in arresting and charging a defendant may constitute a denial of the defendant's Sixth Amendment right to a speedy trial. Nickens v. United States, supra., p. 19. A contrary view had been expressed previously, Mann v. United States, 113 U.S. App. D.C. 27, 304 F 2d 394 (1962) (Note 4), cert. denied

371 U.S. 896 (1962); see also Taylor v. United States, 99 U.S. App. D.C. 183, 238 F. 2d 259 (1956); Petition of Provoo, 17 F.R.D. 183 (D. Md. 1955), aff'd sub nom United States v. Provoo, 350 U.S. 851 (1955). The Court recognized in Nickens, however, see footnote 2, that such a delay, if oppressive, could constitute a denial of due process of law in violation of the defendant's rights under the Fifth Amendment. In order to establish such a denial, the defendant must show that "the delay precluded a fair determination of the charges against him." United States v. Fay, 313 F. 2d 620, 623 (2d Cir. 1963). As stated by this Court in Wilson v. United States, ____ U.S. App. D.C. ____, 325 F. 2d 224 (decided October 17, 1963), a problem of "essential fairness" may be involved where delay prejudices a defendant's "capacity to defend himself."

Upon the basis of the decided cases, therefore, and considering the dictates of both the Fifth and Sixth Amendments, it is submitted that the net effect of this Court's holdings is that delay in arresting a defendant and informing him of the charges against him can constitute a denial of his constitutional rights and require a reversal of his conviction if it appears that the delay is oppressive, in that no good reason is given therefor by the Government, and that prejudice to the defendant is involved.

In this case the delay in arresting the alleged seller of narcotics was a matter of some seven weeks from the first offense and five weeks from the second. There was an additional delay of more than two months after his arrest before appellant was informed that he was being charged with the February 6 offense. No reason for the delay appears in the record. It could not have been for the purpose of obtaining additional

evidence relating to the two offenses charged or relating to additional offenses -- there is no allegation of any additional offense, and the Government did not introduce a single piece of evidence against appellant which was not in its possession at the time of the two alleged offenses.

It is respectfully submitted that the complete lack of any legitimate reason for these delays in itself makes the delays oppressive. The failure to include the February 6 offense in the complaint, or to refer to it at the preliminary hearing, is particularly indefensible. Based upon the testimony of its witness, the Government had full knowledge, when it arrested appellant on March 15, that it was going to seek an indictment against him for an offense which allegedly took place on February 6. Fundamental fairness requires that the Government should have included the February 6 offense in the complaint against appellant and should have referred to it in the proceedings at appellant's preliminary hearing.

The prejudice to appellant as a result of the delays described above can be readily recognized. The officer's testimony was that appellant had committed acts which are clearly criminal. Bearing in mind the natural tendency of a jury to believe the testimony of a police officer, if appellant was not the guilty person his only chance of escaping an unjust conviction was by showing that the officer was mistaken in his identification of appellant. Moreover, since the testimony of appellant or members of his family might well be regarded with suspicion by the jury, the establishment of appellant's alibi rested upon his ability to produce independent testimony concerning his whereabouts on the dates of the two alleged offenses.

It is difficult enough for persons of good reputation, who for professional or other reasons are accustomed to keeping records of their activities, to be able to recall their whereabouts on a particular day with sufficient definiteness so as to be able to obtain independent witnesses who will swear to the particular dates they saw such persons. The difficulty is immeasurably greater for a person who is not so accustomed to keeping records, who stands accused by a police officer and whose record is such that the jury may be more inclined to believe the police officer than the accused.

Such was the dilemma which faced appellant in this case as a result of the delay of the Government in arresting him and in informing him of the charges against him. Such was the dilemma which Judge Wright doubtless had in mind when he observed, in the Nickens case (supra. p. 19, 323 F. 2d at 813):

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposely delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings of the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags."

Under such circumstances, time in knowing the charges against one is surely of the essence -- yet there was in this case substantial delay without good cause.[6/]

6/ It should be noted that the delay found not oppressive in the Nickens case could not have prejudiced the defendant's ability to account for his whereabouts on the day of the alleged offense, inasmuch as he admitted meeting the officer there involved on the day in question.

It is submitted that there was delay, that the Government has given no reason for the delay which would excuse it, and that the delay should be found by this Court to have necessarily prejudiced appellant's ability to defend himself. For the reasons given above the delay worked a deprivation of appellant's constitutional right to a fair and speedy trial, and the Court should therefore reverse his conviction.

CONCLUSION

Each of the three contentions made under the three argument headings above constitutes, standing alone, sufficient grounds for this Court to reverse appellant's conviction and direct that the District Court enter a judgment of acquittal. Such relief is therefore respectfully requested.

Respectfully submitted,

Thomas J. Schwab
Attorney for Appellant
Appointed by this Court

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,272

JOHN H. LEAKS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Thomas J. Schwab,

616 Investment Building
Washington 5, D. C.

Attorney for Appellant,
appointed by this Court

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,272

JOHN H. LEAKS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I. THIS COURT CAN AND SHOULD SUBJECT TO APPELLATE REVIEW THE ISSUE WHETHER THE EVIDENCE CONNECTING APPELLANT TO THE CRIMES WAS SUCH THAT THERE WAS AS A MATTER OF LAW A REASONABLE DOUBT AS TO HIS GUILT.

The Government argues (page 9 of its brief) that appellant failed to move for judgment of acquittal prior to submission of the case and that, accordingly, this Court may not pass upon the sufficiency of the evidence. In support of its position, the Government cites Corbin v. United States, 253 F.2d 646, 647 (10th Cir. 1958), Picciurro v. United States, 250 F.2d 585, 589 (8th Cir. 1958) and Battle v. United States, 92 U.S. App. D.C. 220, 221, 206 F.2d 440,

441 (1953), as well as Rule 29 of Federal Rules of Criminal Procedure. It is submitted that these authorities do not require that this Court decline to review the evidence in this case.

Appellant is not asking this Court simply to pass generally upon the sufficiency of the evidence against him. What appellant does request is appellate review of the trial court's ruling on appellant's motion for judgment of acquittal notwithstanding the verdict, a motion which the trial court denied on its merits. In the Corbin case and the Picciurro case, it appears that the only motion ever presented to the trial court was a motion made at the close of the Government's case, following which defendant introduced evidence. It seems clear that the basis for decision in each of these two cases was that presentation of evidence by the defendant waived his prior motion, and that there was no subsequent motion ever presented to the trial court the denial of which raised an issue upon which the appellate court could rule.

In this case, the trial court did in fact rule upon a motion for judgment of acquittal, that motion was not subsequently waived by any presentation of evidence, and it is the ruling on that motion which appellant now seeks to have this Court review. Moreover, in ruling upon the motion, the trial court made the following statement in the presence of counsel for the Government:

> "Motions were made during the course of the trial for acquittal."
> (Tr., Sentencing, page 2)

While it is true that the transcript does not report the making of prior motions for acquittal, it is also true that the Government raised no objection before the trial court as to the accuracy of the above statement. The present record being inconsistent on the question of whether motions were in fact made during the trial, the failure of the Government to raise the point at a time when the matter could have been looked into and clarified before the court in whose jurisdiction clarification of the record lies, should now estop the Government to deny in this Court the accuracy of the trial court's statement, or, at the very least, should estop the Government to attempt to bar appellate review of the trial court's ruling.

In any event, where the trial court has in fact ruled on a motion for judgment of acquittal notwithstanding the verdict, review in this Court of that ruling should not be barred simply because the trial court may not have been obliged to rule on the motion in the first place, and there does not appear to be any language in Rule 29 of the Federal Rules of Criminal Procedure which requires such a result. While there is language in Battle v. United States, supra, relied upon by the Government, which suggests that the appellate court must decline to review the trial court's ruling under these circumstances, such language is clearly dictum in that case, for the court's holding therein was that the action of the trial court was correct on the merits.

For the reasons set forth above, appellant submits that this Court may properly review the sufficiency of the evidence

against him pursuant to a review of the action of the trial court in denying appellant's motion for judgment of acquittal notwithstanding the verdict. Moreover, even the Government agrees that the appellate court may always make such a review if serious and manifest injustice would otherwise result or if the trial judge's action was plain error or a defect affecting substantial rights. See the three cases cited by the Government on page 9 of its brief, as well as Carr v. United States, 278 F.2d 702, 703 (6th Cir. 1960), Phillips v. United States, 311 F.2d 204 (10th Cir. 1962), Clark v. United States, 293 F.2d 445 (5th Cir. 1961) and Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951). It is respectfully suggested that if, as appellant contends, the evidence linking him to the crimes was such that guilt could not, as a matter of law, be found beyond a reasonable doubt, the sentencing of appellant to eight years in prison on the basis of such evidence would be "serious and manifest injustice."

II. THE GOVERNMENT HAS FAILED TO RESPOND TO APPELLANT'S CONTENTION CONCERNING THE TESTIMONY OF OFFICER MOORE WITH RESPECT TO HIS OTHER PURCHASES OF NARCOTICS DURING THE PERIOD IN QUESTION.

As indicated by the emphasis placed on the matter by appellant in his brief, appellant believes that the answers given by Officer Moore to questions concerning other purchases of narcotics made by him on the days of, and during the two months covered by, the alleged offenses, which testimony is set forth on pages 37-39 of the transcript and is repeated verbatim on pages 4-6 of appellant's brief, are of crucial importance to the decision on this appeal. It is therefore regrettable that the Government has seen fit to devote so little

attention in its brief to this matter, contenting itself essentially with a summary of appellant's contention that, with respect to the officer's testimony: "If true, argues appellant, this testimony demonstrated unreliability. If false, the argument continues, it demonstrated untruthfulness."

The Government argues that "in this posture of the case the truth of the government's testimony must be assumed," citing Thomas v. United States, 93 U.S. App. D.C. 392, 393, 211 F.2d 45, 46 (1954), cert. den., 347 U.S. 969 (1954) (Government's brief, page 11). The relevant language from that case is as follows:

> "Upon a motion for judgment of acquittal, the trial judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom."

Appellant submits that it is impossible to apply the rule of the Thomas case to the Government's evidence in this case, for the reason that portions of Officer Moore's testimony are in direct conflict with other portions, and the truth of all such portions cannot be assumed. To assume the truth of all of Officer Moore's testimony would be to assume that on the day of the trial the officer clearly recalled appellant as the person from whom he purchased narcotics on January 24 and February 6, 1963, but that on the same day he had no recollection whatever as to whether or not he made other purchases of narcotics on either of the two days or during January or February, 1963, and that he was unable to make any estimate as to his average

weekly purchases as an undercover narcotics agent. Appellant respectfully submits that it is inconceivable that one person could have such clear recall of certain events during two one-day periods and during a two-month period and that that same person could have no recall at all as to directly related events during the identical periods.

Appellant has contended in his brief (pages 18-20) that, in the light of Officer Moore's positive identification of appellant, the officer's answers to the other questions referred to above must have been false and must also have been known to the Government to have been so, and that under such circumstances appellant's conviction ought not stand. The most charitable view of the officer's answers would be that, if not false, they in effect constituted a refusal to answer, or an avoidance of answering, the questions propounded by defense counsel, attributable perhaps to departmental policy. But a refusal to answer, or an avoidance of answering, these questions, bearing as they did on the crucial issue of the reliability of the sole witness who connected appellant with the crimes, deprived appellant of his opportunity effectively to face his accuser. Such a deprivation was a violation of appellant's Sixth Amendment right to be "confronted with the witnesses against him," which right has been held to incorporate the right to cross-examine those witnesses. See Snyder v. Massachusetts, 291 U.S. 97, 106 (1933); Greene v. McElroy, 360 U.S. 474, 496 (1959); Collazo v.

United States, 90 U.S. App. D. C. 241, 196 F.2d 573 (1952), cert. den., 343 U.S. 968 (1952). Violation of that right is particularly prejudicial to a defendant where the witness whom he is not able to cross-examine is a police officer and is the only witness who links him with the crimes. The questions which Officer Moore in effect refused to answer, or avoided answering, had a direct and immediate bearing upon his reliability as a witness to the events of January 24 and February 6, 1963, and, hence, upon his reliability as a witness against appellant as to crimes allegedly committed on those dates.

Even if the Thomas case be understood as requiring this Court to assume the truth of a portion of the testimony of a Government witness although that testimony is in direct conflict with other portions of the testimony of the same witness, the result is to strengthen appellant's contention that the evidence linking him to the alleged crimes was insufficient to prove guilt beyond a reasonable doubt. Can the Government deny that the most compelling "legitimate inference" to be drawn from the officer's admissions that he could not recall whether or not he made any other purchases on the two days in question and whether or how many other purchases he may have made during a two-month period, and that he could not even estimate the average number of purchases which he would ordinarily make in a week, is that the officer's memory as to the events of the two days in question was fatally deficient? And if such an inference is made, does not this fatally deficient memory provide too slender a reed upon which to link appellant with two serious crimes and cause his incarceration for a period of eight years?

The Government suggests that the testimony here complained of was "removed from the issue of [appellant's] guilt" (Government's brief, page 11). Where the only issue upon which the case was submitted to the jury was the officer's identification of appellant, it is difficult to understand how testimony, which has a direct and immediate bearing upon the reliability of the officer as a witness generally, and upon the accuracy of his recollections as to the events of the days of the alleged crimes in particular, can be said to be removed from the issue of appellant's guilt.

III. THE AUTHORITIES RELIED UPON BY THE GOVERNMENT DO NOT DEFEAT APPELLANT'S CONTENTION THAT HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND SPEEDY TRIAL.

The Government's brief has dealt separately with the matter of a speedy trial (pages 12-14 of Government's brief) and the matter of a fair trial (pages 14-16 of Government's brief). Appellant did not separate these issues in his brief, for the reason that they are intertwined in this case and cannot be considered apart from one another. Appellant is aware of the implications of Nickens v. United States, ___ U.S. App. D.C. ___, 323 F.2d 808 (1963), which he cited in his brief, and has not contended that a panel of this Court should overrule that decision. Nor did appellant contend, as the Government supposes at the top of page 13 of its brief, that he was deprived of a speedy trial by reason of delays between the time of his arrest and his trial. What appellant does contend is that the courts have developed a concept of procedural due process, related to the requirements of the Sixth Amendment as to speedy trial, which holds that a delay in arresting a defendant may amount to a

deprivation of his constitutional rights where the delay is oppressive under the circumstances and where the defendant's capacity to defend himself is prejudiced. It is this right which appellant seeks now to enforce.[1/]

When appellant's contention is thus understood, it is apparent that the cases relating to waiver of a Sixth Amendment right, cited by the Government beginning at the bottom of page 13 of its brief, are not here relevant, not only because reliance is not being placed on a Sixth Amendment right as such, but also because the theory of the waiver cases is that a defendant who allows delay to go on without asking that it be ended (i.e., without asking that he be brought to trial) cannot thereafter attack that delay -- surely such a doctrine would have no applicability to a defendant whose complaint is as to delay in informing him that he was to be charged with crime. Not knowing of the pendency of proceedings against him, such a defendant would hardly be in a position to take steps to bring the delay to an end.

It is also respectfully submitted that the Government has misconstrued appellant's argument concerning the failure of the

---

1/ In People v. Kiihoa, 53 Cal.2d 748, 349 P.2d 673 (1960), the Supreme Court of California was faced with a more extreme set of facts -- the state had purposely delayed arresting defendant in order that a crucial witness would have left the state and not be available for subpoena by the defendant -- but the reasoning of the court is applicable here. In reversing the conviction, the court observed that "A denial of a fair trial and due process *** would *** exist where the prosecution was allowed to control the course of proceedings in a manner which would prevent the accused from presenting material evidence."

Government to charge him with the February 6th offense at the time of his arrest on March 15th. The issue is not, as the Government suggests, whether there is a constitutional right to a preliminary hearing or whether a grand jury may indict prior to arrest or to preliminary hearing. The issue is one of fundamental fairness and procedural due process of law -- it is whether, when the Government arrests one and charges him with one crime, with the knowledge that he is also to be charged with another crime, allegedly committed by him prior to the arrest and as to which the Government then has in its possession all information needed for arrest and prosecution, the Government should be permitted to withhold from that person the information that it intends to charge him with such crime, particularly where, as here, an alibi, the difficulty of establishing which increases as time goes on, is the only defense. Appellant submits that such a procedure does not comply with accepted standards of fairness which constitute due process of law.

Respectfully submitted,

Thomas J. Schwab
616 Investment Building
Washington 5, D. C.

Attorney for Appellant
appointed by this Court

637

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,272

JOHN H. LEAKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
PAUL A. RENNE,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) a. Whether appellant is entitled to appellate review of the sufficiency of the evidence where he moved for judgment of acquittal notwithstanding the verdict but did not move for judgment of acquittal during trial?

b. In a prosecution for violation of the federal narcotics laws, whether the evidence of guilt was legally sufficient where the testimony of an undercover police officer that he purchased narcotics from appellant on two occasions was uncorroborated on the issue of appellant's identity but was otherwise corroborated by introduction of the narcotics purchased and by evidence that the witness had turned the narcotics over to other officers on the days following the offenses charged in the indictment?

(2) Whether appellant was denied his constitutional rights to due process of law or a speedy trial where he at no time challenged or moved to dismiss the indictment against him, where he was on bond during the entire time which elapsed between his first appearance before a committing magistrate and trial, and where the pertinent sequence of events was as follows:

January 24, 1963	— First offense committed
February 6, 1963	— Second offense committed
March 25, 1963	— Appellant arrested on warrant based on complaint charging him with January offense.
March 25, 1963	— Appellant presented to United States Commissioner. Preliminary hearing continued to April 11 at appellant's request.
April 11, 1963	— Preliminary hearing waived.
May 27, 1963	— Indictment filed charging appellant with both January and February offenses.
June 7, 1963	— Appellant arraigned; trial date set for July 24, 1963.
July 16, 1963	— Trial date continued at request of appellant; reset for October 8, 1963.
October 8, 1963	— Appellant tried and found guilty.

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,272

JOHN H. LEAKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed May 27, 1963, appellant was charged in six counts with violations of the Federal narcotics laws (26 U.S.C. 4704(a), 4705(a), and 21 U.S.C. 174). Three of the counts related to an alleged sale of heroin by appellant on January 24, 1963. The other three counts arose from an alleged sale of heroin by appellant on February 6, 1963. After trial by jury appellant was found guilty on all counts. By judgment and commitment filed November 20, 1963, he was sentenced to terms of imprisonment of eight (8) years on count one, eight (8) years on counts three, four, and six, and

eight (8) months to two (2) years on counts two and five, the sentences imposed on counts two-six to run concurrently with the sentence imposed on count one. The court recommended confinement at Lexington, Kentucky. This appeal followed.

Events between offenses and trial

A warrant for appellant's arrest was issued on March 15, 1963. The complaint on which the warrant was based charged appellant with unlawfully possessing and selling heroin on January 24, 1963.[1] The warrant was executed on March 25, 1963, and later that same day appellant was brought before the United States Commissioner in compliance with Rule 5(a), Fed. R. Crim. P. Preliminary hearing was continued until April 11, 1963 at appellant's request. On April 11, 1963, appellant, represented by retained counsel, waived preliminary hearing.

The indictment filed on May 27, 1963, as already noted, charged appellant in six counts with violations of the federal narcotic laws on both January 24, 1963, and February 6, 1963. Appellant was arraigned upon this indictment on June 7, 1963, and pleaded not guilty thereto. Trial was set for July 24, 1963. On July 16, 1963, the trial date was continued at the request of appellant's retained counsel. Trial was reset for October 8, 1963.[2] On that date the case went to trial before a jury and resulted in a verdict of guilty on all counts. At no time was a motion made to dismiss the indictment for lack of a speedy trial or for any other reason. Appellant was on bond from the day after his first appearance before a committing magistrate until the day of sentencing.

---

[1] Both the complaint and the warrant are part of the record on appeal. So is the Record of Proceedings before the United States Commissioner.

[2] The District Court docket entries in this case (Cr. No. 487-63) do not disclose the fact that the trial date was once continued. The information regarding this continuance was obtained from the District Court clerk's memorandum in the case and from the orange case card on file in the Assignment Office.

The offenses

Rufus Moore, a private in the Metropolitan Police Department, had been assigned to duty as an "undercover officer working in the illicit narcotic traffic" in the District of Columbia. He was so assigned on January 24, 1963 (Tr. 22). At approximately 10:05 p.m. on that day he saw appellant standing on the sidewalk in front of Brown's Restaurant at 1906 Fourteenth Street, N.W. (Tr. 23). "Upon approaching him I asked him if he was sticking,[3] at which time he replied yes, he had a nice $12 bag. At this time I told him I wanted one bag and handed him $12 of Metropolitan Police Department advance funds. Taking the money, he turned to his rear. There was a Negro female, unidentified at the time, standing to the rear." The unidentified female handed the money to appellant who in turn handed it to the officer (Tr. 24). The officer left the area and returned home. There he initialed the package containing the white powder he had purchased from appellant and placed it in an envelope. He kept the envelope in his possession until 11:30 a.m. on January 25, 1963, at which time he gave it to Detective Bertram Fogle in the office of the Narcotic Squad (Tr. 26).

Officer Moore again saw appellant at approximately 4:45 p.m. on February 6, 1963. At this time appellant was standing alone in the 1400 block of T Street, N.W. (Tr. 27). Again appellant was asked if he was "sticking" and again he replied in the affirmative. In return for $12 in advance police funds, appellant gave the officer a bag containing a white powder which he obtained from the front seat of a 1955 Buick (Tr. 28). The witness kept the bag in his possession until 4:30 p.m. the following day, when he turned it over to Detective Irwin Brewer of the Narcotics Squad (Tr. 29). He had no doubt that appellant was the man from whom he had

---

[3] The meaning of the word "sticking" is not explained. It appears from the context, however, to be a verb of the street meaning to sell narcotics.

purchased narcotics on January 24 and February 6, 1963 (Tr. 30).

On cross-examination Officer Moore stated that he had not known appellant or appellant's name prior to January 24. On that date he learned the name Johnny (Tr. 30-31). The following day, when he delivered the narcotics to Detective Fogle, he found appellant's photograph in the office files and learned the name John Leaks (Tr. 31). He was asked whether the name John Leaks appeared in his notes concerning the February 6 offense and stated that it did not (Tr. 37).[4] The witness was not able to state approximately how many purchases of narcotics he had made in the months of January and February, 1963. He did not remember any transactions on January 25 and February 6 other than those involving appellant. He didn't know the average weekly number of purchases made by him while working as an undercover officer (Tr. 37-39).

Detective Fogle testified that he was present in the office of the Narcotic Squad on the morning of January 25, when Rufus Moore identified appellant's photograph as being a picture of the man from whom he had purchased narcotics (Tr. 44-45).

It was stipulated between counsel that the exhibits introduced by the government and identified as having been purchased from appellant were narcotic drugs, that their importation and sale was prohibited by law, that their sale was not pursuant to a written order, and that they were not taken from the original package bearing the appropriate tax stamps (Tr. 45-47).

Appellant's defense was alibi. He testified that on the

---

[4] On redirect examination, Officer Moore explained that in his notes and reports he continued to refer to a man by the name or alias by which that man had first become known to him. This practice was followed, since he filed his reports alphabetically, even if the man's true identity became known (Tr. 41). The notes of the witness concerning the February 6 offense were marked for identification and showed that appellant was there referred to as Johnny, the same name used in the notes concerning the January 24 offense.

evening of January 23, 1963, together with his mother, wife, and child, he drove to Greenville, South Carolina and did not return to the District of Columbia until February 9th or 10th (Tr. 50). The alibi was supported by the testimony of appellant's wife and mother (Tr. 62-65, 72-75). According to the testimony of appellant and his wife, both their employers were available to testify (Tr. 60, 71). Neither was called as a witness. Appellant denied having ever seen Rufus Moore until the morning of the day of trial (Tr. 49).

No motion for judgment of acquittal was made either at the conclusion of the government's case or at the close of all the evidence. A motion for judgment of acquittal notwithstanding the verdict was made and denied.[5]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

---

[5] See the official transcript of sentence proceedings, page 3. At the time he denied the motion for judgment of acquittal notwithstanding the verdict, the trial judge remarked that motions for acquittal had been made during the trial. The trial transcript, however, does not reflect the making of any such motions.

STATUTES INVOLVED

Title 21, § 174, United States Code, provides:

Same: penalty: evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Title 26, § 4704(a), United States Code, provides:

General requirement

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, § 4705(a), United States Code, provides:

General requirement

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

I

In the absence of motions for judgment of acquittal made either at the conclusion of the government's case or at the close of all the evidence, appellant's motion for judgment of acquittal notwithstanding the verdict came too late to preserve the question of sufficiency of the evidence for appellate review. Even had the point been properly saved, the evidence of appellant's guilt was plainly sufficient. Officer Moore positively identified appellant as the person who sold him narcotics on two occasions. The narcotics themselves were placed in evidence, and it was stipulated that they were not taken from the original package and that their sale was not pursuant to a written order and was prohibited by law. Corroboration on the issue of appellant's identity was not required. The testimony of Officer Moore, if believed, provided a basis for a reasonable conclusion of guilt beyond a reasonable doubt. The credibility of this witness was for the jury to determine, and appellant is not entitled to appellate evaluations of credibility or redeterminations of disputed issues of fact.

II

Delay between the offenses charged in the indictment and the trial did not operate to deny appellant due process of law or to deprive him of a speedy trial. But for an interval of seven weeks between the first sale of nar-

cotics and appellant's arrest therefor, the delay in bringing appellant to trial was entirely attributable to the ordinary processes of justice and to appellant's request for a continuance of the trial date. The period of time between arrest and trial was only six and a half months, and appellant was not only free on bond during this entire period but at no point moved to dismiss the indictment or to expedite trial. Moreover, appellant's allegation that he was prejudiced by the delay in that his ability to defend himself at trial was impaired is completely unfounded.

Appellant's novel claim that a denial of due process resulted from the government's failure to inform him that an indictment would be sought for an offense in addition to the offense for which he was arrested and brought before a committing magistrate is without merit. The purpose of a preliminary hearing is to advise a defendant of his rights and to protect him against an unjust incarceration while he is awaiting the action of the grand jury. The grand jury is not restricted, however, to a consideration of charges already presented to a committing magistrate. The grand jury may indict without prior notice to a defendant. Moreover, appellant demonstrates no prejudice arising from failure to inform him of the second offense prior to indictment.

ARGUMENT

I. Evidence of appellant's guilt was legally sufficient.

(See Tr. 30, 31, 37-39, 45-47, 91)

Appellant contends that since the testimony of Officer Moore identifying him as the man who sold narcotics on the dates specified in the indictment was uncorroborated, the evidence was insufficient to support his conviction. Even had the question of sufficiency of the evidence been adequately preserved for review, it must be resolved adversely to appellant.

The transcript of the trial proceedings does not reveal that appellant moved for judgment of acquittal prior to submission of the case to the jury. Generally, a federal appellate court will not pass on sufficiency of the evidence to support a verdict in the absence of a motion for judgment of acquittal interposed at the close of all the testimony. *Corbin* v. *United States*, 253 F.2d 646, 647 (10th Cir. 1958); *Picciurro* v. *United States*, 250 F.2d 585, 589 (8th Cir. 1958); *Battle* v. *United States*, 92 U.S. App. D.C. 220, 221, 206 F.2d 440, 441 (1953). A motion for judgment of acquittal notwithstanding the verdict, which appellant did make, comes too late to save the question of sufficiency of the evidence for appellate review. *Battle* v. *United States, supra;* Rule 29, Fed. R. Crim. P. At the very least, in order to prevail on this issue, appellant would be obliged to demonstrate that serious and manifest injustice would result if the verdict were permitted to stand. *Corbin* v. *United States, supra. Thompson* v. *United States*, 245 F.2d 232, 233 (5th Cir. 1957); *Benham* v. *United States*, 215 F.2d 472, 473 (5th Cir. 1954). He has made no such showing. Appellant was positively identified as the person who possessed and sold narcotic drugs on January 24 and February 6, 1963. The other elements of the crimes charged in the indictment were established by stipulation (Tr. 45-47). No legal deficiency is apparent in this evidence, much less such a deficiency as would warrant this Court in invoking its power to correct plain error under Rule 52(b), Fed. R. Crim. P.

Giving appellant the full benefit on review of a motion for judgment of acquittal which he never made, his claim must nevertheless fail. The principles by which the legal sufficiency of the evidence in criminal cases is tested on appeal require that a judgment of conviction be sustained if, taking the view most favorable to the government and giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable man might fairly have concluded guilt beyond a reasonable doubt. *Glasser* v.

United States, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), *cert. denied*, 331 U.S. 837 (1947). Appellant urges that a reasonable doubt of guilt must necessarily have been generated in the mind of a reasonable man by the testimony of Officer Moore. Appellee respectfully disagrees.

Moore's identification of appellant was positive and unequivocal (Tr. 30). It was based on Moore's observations on the two separate occasions when narcotics were sold to him by appellant. These observations were sufficient to enable Moore to locate appellant's photograph among those on file in the office of the Narcotic Squad (Tr. 39, 45). No reason is suggested why they were not also sufficient to enable Moore to identify appellant at trial. Certainly the facts that Moore had never seen appellant prior to the first offense and had not seen him between the date of the second offense and the date of trial did not render his identification inadequate as a matter of law. The witness said he had no doubt appellant was the man from whom he purchased narcotics. His credibility was an issue for the jury.

Appellant now seeks an appellate evaluation of Moore's credibility. He does not take the position that corroboration is required in every narcotics case, and indeed such a position would be untenable in view of the holding of this Court that the uncorroborated testimony of an undercover police officer will support a conviction for violation of the federal narcotics laws.[6] *Wilson* v. *United States*, D.C. Cir. No. 17,895, decided October 3, 1963,

---

[6] Uncorroborated accomplice testimony will also support a conviction. *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 89, 243 F.2d 32, 33 (1957); *McQuaid* v. *United States*, 91 U.S. App. D.C. 229, 230, 198 F.2d 987, 989 (1952), *cert. denied*, 344 U.S. 929 (1953). While it is proper to instruct the jury to receive such testimony with care, failure to do so is not plain error. *Lyles* v. *United States*, 249 F.2d 744, 745 (5th Cir. 1957); *Gormley* v. *United* States, 167 F.2d 454, 457 (4th Cir. 1948). In the instant case the witness was not an accomplice but a police officer and there was no request for an instruction, assuming one would have been proper, on the weight to be given his testimony.

petition for rehearing *en banc* denied February 13, 1964. And *cf. Morgan* v. *United States*, — U.S. App. D.C. —, 319 F.2d 711 (1963); *Fletcher* v. *United States*, 111 U.S. App. D.C. 192, 295 F.2d 179 (1961), *cert. denied*, 386 U.S. 993 (1962); *Smith* v. *United States*, 110 U.S. App. D.C. 344, 293 F.2d 532 (1961). He does contend, however, that cross-examination cast such doubt on Moore's credibility that the uncorroborated testimony of this witness afforded no basis for a conclusion of guilt beyond a reasonable doubt. In support of this contention, he points to the facts that Moore could not remember approximately how many narcotics transactions he had engaged in during the months of January and February, 1963, could not remember whether he had made more than one purchase of narcotics on January 24 and February 6, and did not know the average weekly number of purchases made by him while working in an undercover capacity (Tr. 37-39). If true, argues appellant, this testimony demonstrated unreliability. If false, the argument continues, it demonstrated untruthfulness. However viewed, it is said to have placed on the government the burden of presenting corroborating evidence of guilt.

The testimony of which appellant complains was removed from the issue of his guilt. It was not inherently incredible or even improbable and was not contradicted by other evidence in the case. No reason whatever, based either on facts of record or on experience, appears why this Court should recognize the testimony as false. Obviously the jury did not reject it, although urged in closing argument to do so (Tr. 91). Moreover, in this posture of the case the truth of the government's testimony must be assumed. *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 393, 211 F.2d 45, 46 (1954), *cert. denied*, 347 U.S. 969 (1954).

Officer Moore's testimony that he purchased narcotics from appellant was corroborated by the introduction of heroin purchased. Appellant's defense of alibi created a disputed issue of fact on the issue of identity. That issue was submitted to the jury under proper instructions

and was resolved adversely to appellant. He is not entitled to appellate redetermination of factual disputes.

II. Appellant was not denied his constitutional right to a fair and speedy trial

(Tr. 50, 56, 60, 62-65, 71, 72-75)

Two sales of narcotics gave rise to the six counts of the indictment upon which appellant was brought to trial. Two weeks separated the sales themselves. Seven weeks elapsed between the first sale and appellant's arrest. In addition, there were intervals of six weeks between the day appellant waived preliminary hearing and the day the indictment was returned, of ten days between indictment and arraignment, and of seven weeks between arraignment and the original trial date of July 24, 1963. On July 16 a continuance was granted at appellant's request and trial was reset for October 8, 1963. The case proceeded to trial on that day. A total of eight-and-a-half months elapsed between the first offense and trial. Appellant was incarcerated for only one day during this entire period. At no time did he move to dismiss the indictment or to expedite trial. In this context appellant asserts the constitutional claims that he was denied due process of law and a speedy trial.

A. *Speedy Trial*

This Court has recently held that the Sixth Amendment affords no protection against delays between offense and arrest.[7] *Nickens* v. *United States*, — U.S. App. D.C. —, —, 323 F.2d 808, 809 (1963). Prior expressions of a contrary view were there distinguished or disapproved. In *Nickens* the delay between offense and arrest was seven-and-a-half months. In the instant case it was seven weeks. *A fortiori* the period of delay here involved is

[7] It was held in *Nickens* that such delays relate only to the running of the applicable statute of limitations. The applicable statute in this case runs for three years. 26 U.S.C. § 6531. Obviously, appellant does not contend that prosecution was barred by this statute.

legally irrelevant to appellant's claim that he was denied a speedy trial.

Only six-and-a-half months elapsed between appellant's arrest and his trial. This Court has frequently found equal or longer intervals to be not unreasonable. *Smith* v. *United States*, D.C. Cir. No. 17106, decided *en banc* February 20, 1964 (6 months); *Nickens* v. *United States*, *supra* (9 months); *Willis* v. *United States*, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959) (10 months); *Porter* v. *United States*, 106 U.S. App. D.C. 150, 270 F.2d 453 (1959) (7 months); *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F.2d 567 (1959) (7 months). Moreover, the only delay not attributable to the normal processes of justice was caused by appellant himself when he requested a continuance of the trial date on July 16. No continuances were initiated by the prosecution. Nor were any caused by calendar congestion.

Another circumstance which weighs heavily against appellant is the lack of prejudice resulting from the delay between arrest and trial. The only prejudice alleged is impairment of his ability to produce evidence in support of his alibi defense. But this allegation is refuted by facts of record. Appellant's wife and mother both testified that he was in South Carolina on the critical dates charged in the indictment (Tr. 62-65, 72-75). A man whom appellant had told he was leaving town was present in the courtroom but was not called to testify (Tr. 56). The employers of both appellant and his wife were also available but were not called to testify (Tr. 60, 71). Appellant does not allege that a single witness who might have supported his alibi was unavailable on the date of trial. Under the circumstances it is impossible to conclude that appellant's ability to defend himself was impaired. Certainly appellant cannot point to pre-trial incarceration as a source of prejudice because he was on bond at virtually all times following his appearance before a committing magistrate.

Finally, appellant's acts and omissions constituted the clearest waiver of his Sixth Amendment rights. At no

time did he move to dismiss the indictment for lack of a speedy trial or for want of prosecution under Rule 48(b), Fed. R. Crim. P. Nor did he make a request to expedite trial. He not only registered no objection to the single continuance of the trial date, but he himself procured that continuance. Failure to assert in any way his rights under the Sixth Amendment operated as a waiver of those rights. *Smith* v. *United States*, *supra* (slip opinion, p. 7); *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381 (1958); *Campodonico* v. *United States*, 222 F.2d 310 (9th Cir. 1955); *Pietch* v. *United States*, 110 F.2d 817 (10th Cir. 1940); *Petition of Provoo*, 17 F.R.D. 183, 198 (D.Md. 1955), *aff'd without opinion sub nom. United States* v. *Provoo*, 350 U.S. 857 (1955).

B. *Due Process*

Appellant sold narcotics on January 24 and February 6, 1963. The warrant for his arrest was issued on March 15 and executed on March 25, 1963. Both the warrant and the complaint in support thereof referred only to the January offense. Preliminary hearing as to that offense was waived on April 11, 1963. It does not appear from the record that appellant was advised of the February offense until the indictment was returned on May 27, 1963. He argues that the government's failure to inform him, at the time of his arrest or presentment, that an indictment would be sought as to the February offense denied him due process of law. In effect, therefore, he contends that he was entitled to a preliminary hearing on the February offense and that failure to accord such a hearing worked a deprivation of constitutional rights.

There is no constitutional right to a preliminary hearing. *Barrett* v. *United States*, 270 F.2d 772, 775-776 (8th Cir. 1959); *United States* v. *Heideman*, 21 F.R.D. 335, 336 (D.D.C. 1958), *aff'd* 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); *Burall* v. *Johnston*, 53 F.Supp. 126, 129 (D.C. N.D. Cal. 1943), *aff'd*, 146 F.2d 230 (9th Cir. 1944), *cert. denied*, 325 U.S. 887 (1944). Arrest and preliminary hearing

need not precede indictment, and the grand jury is not limited to considering cases only of those persons who have been bound over to it by action of a committing magistrate. *United States* v. *Shields*, 291 F.2d 798, 799 (6th Cir. 1961), *cert. denied*, 368 U.S. 933 (1961); *Nelson* v. *Sacks*, 290 F.2d 604, 605 (6th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961); *United States ex rel. Bogish* v. *Tees*, 211 F.2d 69, 72 (3d Cir. 1954); *Barber* v. *United States*, 142 F.2d 805, 807 (4th Cir. 1944); *United States* v. *Lucas*, 13 F.R.D. 177 (D.D.C. 1952), *aff'd* 91 U.S. App. D.C. 278, 201 F.2d 182 (1952); *United States* v. *Gray*, 87 F. Supp. 436, 437 (D.D.C. 1949). The reason, of course, is that there is no purpose left to be served by a preliminary hearing once a grand jury has acted. It follows that no constitutional rights would have been infringed had prosecution for both offenses been initiated against appellant by original indictment rather than by complaint. Certainly appellant could not then have complained that he was not sooner indicted. *Parker* v. *United States*, 252 F.2d 680, 681 (6th Cir. 1958), *cert. denied*, 355 U.S. 964 (1958). He is in no better position to complain when prosecution for one offense was initiated by complaint and for another by indictment. Moreover, appellant received all the benefits contemplated by Rules 5 (a) and 5(b), Fed. R. Crim. P. He was advised by his rights and the issue of probable cause was promptly determined. A proper basis having been found to hold him for the action of the grand jury on the January offense, a hearing to determine probable cause as to the February offense would have been superfluous.

To constitute a denial of due process in a criminal trial, "the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). Where a lapse of time is claimed to result in a denial of due process, the party advancing the claim must show that he has been unduly prejudiced by the delay. *United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963); *Odell* v. *Burke*, 281 F.2d 782, 787 (7th Cir. 1960); *Petition of Sawyer*,

229 F.2d 805 (7th Cir. 1956), *cert. denied, sub nom. Sawyer* v. *Barczak*, 351 U.S. 966 (1956); *Germany* v. *Hudspeth*, 209 F.2d 15 (10th Cir., 1954), *cert. denied*, 347 U.S. 946 (1954). For the reasons stated in *part* A of this argument, appellant is utterly unable to show that delay precluded a fair determination of the charges against him. His alibi defense covered the February as well as the January offense,[8] and his ability to present this defense at trial was unimpaired. His allegations to the contrary are unsupported. Moreover, the constitutional rights which appellant now seeks to invoke were never asserted and were therefore waived.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
PAUL A. RENNE,
ANTHONY A. LAPHAM,
Assistant United States Attorneys.

[8] Appellant, his wife, and his mother all testified that they were in South Carolina on both the critical dates (Tr. 50, 62-64, 73-74).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 726182 819